Supreme Court, U.S.
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No. 00-1925

IN THE

Supreme Court of the United States

CONSOLIDATED DEVELOPMENT CORPORATION and CONSOLIDATED CUBAN OIL & GAS RIGHTS CORPORATION,

Petitioners,

v.

SHERRITT, INC., SHERRITT INTERNATIONAL, INC., CANADA NORTHWEST ENERGY LIMITED, THE REPUBLIC OF CUBA, CUBAPETROLEO, COMMERCIAL CUPET, S.A., UNION DE LAS EMPRESAS DE NIQUEL, GENERAL NICKEL COMPANY, S.A., MOA NICKEL, S.A., INTERNATIONAL COBALT COMPANY, INC., THE COBALT REFINERY COMPANY, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

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Pursuant to Supreme Court Rule 15.6 the Petitioners in the instant case respectfully submit this brief in reply to the "Joint Brief for the Respondents in Opposition."

The Respondents mistakenly suggest that the relevant test in this case "must satisfy the standards for general jurisdiction," and not specific jurisdiction. Brief in Opp. 7. However, the distinction between general jurisdiction and specific jurisdiction is rooted in the Due Process Clause of the Fourteenth Amendment. *See Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408 (1984). Because of its roots in the Fourteenth Amendment, the distinction between general jurisdiction and specific jurisdiction applies to state law alone, not federal law.

Rule 4(k)(2) can be invoked when cases arise "with respect to claims arising under federal law," and not state law. Therefore, the relevant standard is the Due Process Clause of the Fifth Amendment and not the Fourteenth Amendment. For this reason, the Advisory Committee on Rule 4(k)(2) noted, "There remain constitutional limitations on the exercise of territorial jurisdiction by federal courts over persons outside the United States. These restrictions arise from the *Fifth Amendment rather than the Fourteenth Amendment* [emphasis added]." Indeed, Rule 4(k)(2) was created precisely for those cases where the defendant is beyond the reach of state law, but not beyond the reach of federal law. *See* Pet. App. 12-14, for a fuller discussion of Rule 4(k)(2).

In the instant case, the federal claim arose out of the continued exploitation of the property of a U.S. corporation, expropriated by the Republic of Cuba in contravention of federal law. State law does not come into play in this case,

and does not come into play by invoking of Rule 4(k)(2). Therefore, the distinction between general jurisdiction and specific jurisdiction is not relevant to the analysis of personal jurisdiction over the defendant Sherritt or the Canadian defendants in this case.[1]

For these reasons, the Petitioners submit, the Eleventh Circuit was in error to approach the instant case through the analysis of the distinction between general and specific jurisdiction. On the other hand, the Rule 4(k)(2) analysis of the Seventh Circuit in *ISI International Inc. v. Borden Ladner Gervais LLP*, 2001 WL 747642 (7th Cir.) (per J. Easterbrook) is correct. In that case, the claim was made pursuant to the Lanham Act, 15 U.S.C. § 1125 (a)(1)(B). In *ISI International*, Judge Easterbrook eschewed the distinction between general and specific jurisdiction, as was proper in a claim brought pursuant to federal law and not state law. The relevant factor in *ISI International* was not, as the Respondents assert, that "the foreign defendant was sued for its activities in the United States." Brief in Opp. 9. Rather the relevant factor was that the claim was made pursuant to federal law, obviating the need for the general/specific jurisdiction analysis.

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1. The Respondents have failed to mention Sherritt's extensive commercial activities in the United States: At least two bond offerings totaling $300,000,000, multiple S.E.C. filings, appointment of two agents for service of process in the United States, and the use of a U.S. law firm and financial agent. The Respondents have also failed to mention that the prospectuses and S.E.C. filings relating to the bond offerings refer openly and repeatedly of Sherritt's continued exploitation of the Petitioners Cuban property. *See* Pet. App. 2-9.

The Respondents have unwittingly given this Court yet another question to consider and another reason for granting the Petition for Writ of Certiorari. By arguing that the Eleventh Circuit was correct in applying the standard of general, as opposed to specific jurisdiction, the Respondents have pointed out another conflict between the circuits. The Eleventh Circuit relied on the general/specific jurisdiction analysis in its approach to Rule 4(k)(2). The Seventh Circuit found it unnecessary to do so. Granting of the petition would allow this Court to resolve this conflict between the circuits and define the contours of Due Process with respect to Rule 4(k)(2).

CONCLUSION

For these reasons, as well as those previously stated, the petition should be granted.

Respectfully submitted,

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